QUESTIONS PRESENTED

1. Whether petitioner received adequate notice of the district court's final judgment when the clerk's office served a copy of that judgment on petitioner's local counsel.

2. Whether Rule 60(b)(1) of the Federal Rules of Civil Procedure applies to neglect that arose during the period covered by Rule 4(a) of the Federal Rules of Appellate Procedure.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Babich v. *Clower*, 528 F.2d 293 (4th Cir. 1975)	7
Borowski v. *DePuy, Inc.*, 876 F.2d 1339 (7th Cir. 1989)	6
Buckeye Cellulose Corp. v. *Braggs Electric Construction Co.*, 569 F.2d 1036 (8th Cir. 1978)	10
Burkett v. *Cunningham*, 826 F.2d 1208 (3d Cir. 1987)	10
Expeditions Unlimited Aquatic Enterprises, Inc. v. *Smithsonian Institute*, 500 F.2d 808 (D.C. Cir. 1974)	9
Fidelity Deposit Co. v. *USAFORM Hail Pool, Inc.*, 523 F.2d 744 (5th Cir. 1975), cert. denied, 425 U.S. 950 (1976)	10
Gamble v. *United States*, 989 F.2d 507 (10th Cir. 1993)	8
Gooch v. *Skelly Oil Co.*, 493 F.2d 366 (10th Cir.), cert. denied, 419 U.S. 997 (1974)	6
Hall v. *Community Mental Health Center*, 772 F.2d 42 (3d Cir. 1985)	10
Harnish v. *Manatee County*, 783 F.2d 1535 (11th Cir. 1986)	10
Irwin v. *Department of Veterans Affairs*, 498 U.S 89 (1990)	6
Lord v. *Helmandollar*, 348 F.2d 780 (D.C. Cir. 1965), cert. denied, 383 U.S. 928 (1966)	6
Mennen Co. v. *Gillette Co.*, 719 F.2d 568 (2d Cir. 1983)	7, 9-10
Pasquale v. *Finch*, 418 F.2d 627 (1st Cir. 1969)	6
Payton v. *Spruiell*, 951 F.2d 1260 (10th Cir. 1992)	8

Cases–Continued: Page

Pioneer Inv. Serv. Co. v. *Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489 (1993) 6, 11
Rodgers v. *Watt*, 722 F.2d 456 (9th Cir. 1983) 5
Scola v. *Boat Frances, R., Inc.*, 618 F.2d 147 (1st Cir. 1980) 9
Smith v. *Frank*, 923 F.2d 139 (9th Cir. 1991) 2
Smith v. *Jackson Tool & Die, Inc.*, 426 F.2d 5 (5th Cir. 1970) 10
Spika v. *Village of Lombard*, 763 F.2d 282 (7th Cir. 1985), cert. denied, 474 U.S. 1056 (1986) 10

Statute and rules:

Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* 2
Bankr. R. 9006(b)(1) 11
Fed. R. App. P.:
Rule 4(a) 2, 5, 9
Rule 4(a)(1) 2, 5, 9
Rule 4(a)(5) 2, 5, 7, 9
Rule 4(a)(6) 3, 4, 5, 6, 7, 8
Fed. R. Civ. P.:
Rule 60(b) 4, 7, 9, 10, 11
Rule 60(b)(1) 3, 4, 5, 9, 11
Rule 60(b)(6) 3, 4, 5, 6

Miscellaneous:

Amendments to Federal Rules of Appellate Procedure, 500 U.S. 1011 (1991) 3, 8-9
Citation of Unpublished Opinions/Orders and Judgments, In re, 151 F.R.D. 470 (10th Cir. 1993) 8

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1696

JACK C. SMITH, PETITIONER

v.

MARVIN T. RUNYON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-11a) is unpublished, but the decision is noted at 15 F.3d 1089 (Table). The opinion of the district court (Pet. App. 12a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1994. The petition for a writ of certiorari was filed on April 26, 1994. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner filed suit against the United States Postal Service, alleging that he had been discharged due to a physical handicap, in violation of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* Pet. App. 6a. The case was tried before a United States magistrate, who recommended that judgment be entered in favor of the Postal Service. *Ibid.* On July 19, 1991, the district court adopted the magistrate's findings of fact and conclusions of law and entered judgment for the Postal Service. *Ibid.*[1] Notice of the entry of judgment was sent to petitioner's local counsel in San Francisco, but not to his lead counsel in Washington, D.C. *Ibid.*

Rule 4(a)(1) of the Federal Rules of Appellate Procedure provided petitioner with 60 days within which to file a notice of appeal.[2] Under Fed. R. App. P. 4(a)(5), a district court has discretion to grant an extension of time to appeal if a motion is filed not more than 30 days after the notice of appeal is due.[3] Petitioner's right to file a notice of appeal expired in September, 1991, see Pet. App. 7a, and his opportunity to seek an extension of time expired the following month.

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[1] A previous judgment entered against petitioner in this case was reversed by the court of appeals on grounds not relevant here. See *Smith* v. *Frank*, 923 F.2d 139 (9th Cir. 1991).

[2] Rule 4(a)(1) provides in pertinent part:

> [I]n a civil case in which * * * the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after [entry of judgment].

[3] Rule 4(a)(5) provides in relevant part:

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a).

Pursuant to amendments promulgated by this Court, Fed. R. App. P. 4(a)(6) "t[ook] effect on December 1, 1991, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending." Amendments to Federal Rules of Appellate Procedure, 500 U.S. 1007, 1009, 1011 (1991). Under Rule 4(a)(6), when a party does not receive notice of a judgment but files a motion seeking an extension of the time to appeal within 180 days after the entry of the judgment, the district court has discretion to reopen the time to appeal for 14 days.[4] 500 U.S. at 1011.

On January 9, 1992, petitioner's lead counsel requested that the district court extend the time to appeal under Rule 4(a)(6); or, in the alternative, that the court vacate and reenter the judgment under Fed. R. Civ. P. 60(b)(1) or (6). Petitioner alleged that, since the court had sent all communications prior to the notice of entry of judgment to both counsel, local counsel had not informed lead counsel of the judgment when he received notice of it. Pet. App. 6a. Petitioner asserted that lead counsel had not learned of the judgment until January 2, 1992, during a conversation with counsel for the Postal Service concerning a related matter. See *id.* at 6a-7a.

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[4] Rule 4(a)(6) reads as follows:

> The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

2. The district court denied the motion. Pet. App. 12a. The court first "question[ed] whether Amended Rule 4(a)(6) is even applicable to this case," noting that the Rule had come into effect on December 1, 1991, after petitioner's right to appeal had expired. *Id.* at 15a. Even if Rule 4(a)(6) did apply, the court held, it would provide no relief to petitioner. Under Rule 4(a)(6), a district court may reopen the time to appeal only when a "party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." Fed. R. App. P. 4(a)(6). In this case, the court observed, petitioner had received notice of the judgment through his local counsel within 21 days and thus was not entitled to relief. Pet. App. 15a-16a.

The district court also denied relief under Fed. R. Civ. P. 60(b)(1), holding that petitioner's failure to file a timely notice of appeal was not due to excusable neglect.[5] The court observed that petitioner's local counsel was notified of the judgment and that "[t]his constitutes sufficient notice to plaintiff." Pet. App. 17a-18a. The court also stated that lead counsel's "failure to inquire with the court or opposing counsel of the status of the case for almost six months * * * does not constitute due diligence." *Id.* at 18a. Finally, the district court

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[5] Rule 60(b) provides in relevant part:

> **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment.

declined to provide relief under Fed. R. Civ. P. 60(b)(6), explaining that petitioner's misplaced reliance on the district court to send a notice of the judgment to lead counsel was not an "extraordinary circumstance" entitling petitioner to relief under that Rule. Pet. App. 18a-19a.

3. The Ninth Circuit affirmed. Pet. App. 6a. Like the district court, the court of appeals found it unnecessary to decide whether Fed. R. App. P. 4(a)(6) should be applied retroactively. It held that petitioner "could not obtain relief even if amended Rule 4(a)(6) applies," explaining that the notice provided to local counsel had sufficiently informed petitioner of the entry of judgment. Pet. App. 8a.

The court also held that relief under the "excusable neglect" standard of Rule 60(b)(1) was not available, since the neglect of petitioner's attorneys occurred during the period covered by Rule 4(a). Pet. App. 9a. Petitioner's local counsel was notified of the judgment on July 23, 1991, five days after the entry of judgment on July 18, 1991, and prior to the expiration of the period for filing a notice of appeal under Rule 4(a)(1) or for requesting an extension of time to appeal under Rule 4(a)(5). Pet. App. 9a. Relief under Rule 60(b)(1), the court stated, is available only in cases where neglect occurs outside the period covered by Rule 4(a), which independently provides relief for "excusable neglect." Pet. App. 9a. This limitation, the court explained, is necessary to protect "the integrity of the deadline imposed by Rule 4(a)." *Ibid.* (citing *Rodgers* v. *Watt*, 722 F.2d 456, 459 (9th Cir. 1983) (en banc)).[6]

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[6] The court also held that relief was not available under Rule 60(b)(6). That provision requires a party to show extraordinary circumstances "suggesting that the party is faultless in the delay."

ARGUMENT

1. a. Petitioner contends that Rule 4(a)(6) revives his right to appeal. Pet. 14-19. The Ninth Circuit correctly concluded, however, that petitioner does not qualify for relief under that Rule. The court of appeals based its holding on the principle that, "[w]here a party has two counsel of record, notice to one counsel sufficiently informs a party of an entry of judgment." Pet. App. 8a.[7] The court of appeals also noted that petitioner was required by local rule to designate local counsel upon whom documents could be served, and that this rule "would be of little use to the district court" if the court were "required to communicate with out-of-town counsel to give adequate notice." *Id.* at 8a-9a n.2.

Pet. App. 10a (quoting *Pioneer Inv. Serv. Co.* v. *Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489, 1497 (1993)). Because the neglect of petitioner's counsel was not a circumstance beyond petitioner's control, he could not qualify for relief under Rule 60(b)(6). Pet. App. 10a. The petition for a writ of certiorari does not contest that aspect of the court of appeals' decision.

[7] Courts of appeals have consistently held that service of a judgment on local counsel constitutes adequate notice to a party, absent otherwise misleading conduct by the district court. See *Lord* v. *Helmandollar*, 348 F.2d 780, 782 (D.C. Cir. 1965) (time for filing notice of appeal not extended when local counsel received notice of judgment but lead counsel did not), cert. denied, 383 U.S. 928 (1966); *Pasquale* v. *Finch*, 418 F.2d 627, 630 (1st Cir. 1969) (same); *Borowski* v. *DePuy, Inc.*, 876 F.2d 1339, 1341 (7th Cir. 1989) (same); *Gooch* v. *Skelly Oil Co.*, 493 F.2d 366, 370 (10th Cir.) (same), cert. denied, 419 U.S. 997 (1974). That rule is consistent with the general principle that "[u]nder our system of representative litigation, each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 92 (1990) (internal quotation marks omitted).

Although petitioner admits that he "has been unable to discover any case which decides the same issue under Rule 4(a)(6)," he maintains that two courts of appeals have reached holdings inconsistent with that of the Ninth Circuit in ruling on motions to extend the time to appeal under Rule 4(a)(5) and Rule 60(b). Pet. 15. In fact, the appellate decisions cited by petitioner are inapposite. In *Mennen Co.* v. *Gillette Co.*, 719 F.2d 568, 570 (2d Cir. 1983), appellant's counsel did not receive notice of the judgment at all. The Second Circuit held that the late notice of appeal was due to "the clerk's failure to abide by [the judge's] precise instructions, not to [the appellant's] own negligence." *Id.* at 570. The court did not discuss the question whether notice to local counsel is sufficient to bind a party. In *Babich* v. *Clower*, 528 F.2d 293 (4th Cir. 1975), the district court issued a final order stating that a copy of the memorandum opinion would be sent to all counsel of record, which included appellants' out-of-state lead counsel. In fact, no copy of the order was sent to lead counsel. *Id.* at 295. The Fourth Circuit held that the appellants' failure to file a timely appeal was "excusable neglect" under Rule 4(a)(5). 528 F.2d at 295. The court explained that "[w]hile Local Rule 7(D) does provide that service on a resident associate of a foreign attorney is equivalent to service on the parties for whom he appears, the language of the court's order was such that the [local] attorney might reasonably have believed that the opinion and order were mailed to appellants' [lead] counsel, who was in charge of the litigation, regardless of the language of the local rule." *Id.* at 295-296. The Fourth Circuit thus emphasized the appellants' reasonable reliance on the statement by the district court—a consideration that is absent in the instant case.

b. Having concluded that petitioner did not qualify for relief under the terms of Rule 4(a)(6), the Ninth Circuit

did not decide whether that Rule should apply retroactively. Petitioner contends (Pet. 19), however, that the Fifth and Tenth Circuits are in conflict on this question and that this Court should grant certiorari to resolve the issue.

The purported circuit conflict provides no basis for this Court's review. In the instant case, the Ninth Circuit determined that Rule 4(a)(6) was inapplicable by its terms to petitioner's claim for relief. The Ninth Circuit did not decide the question of retroactivity, and its judgment would be unaffected by any ruling this Court might issue regarding that question. In addition, no true circuit conflict exists, since the Tenth Circuit decisions cited by petitioner are unpublished opinions having no precedential value.[8] Finally, the question of retroactivity of Rule 4(a)(6) is of no lasting significance, since it affects, at most, only those cases in which judgments were entered during the 180-day period immediately before December 1, 1991, the date Rule 4(a)(6) took effect.[9]

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[8] See *Gamble* v. *United States*, 989 F.2d 507 (10th Cir. 1993) (Table); *Payton* v. *Spruiell*, 951 F.2d 1260 (10th Cir. 1992) (Table). The Tenth Circuit has made clear that its unpublished decisions "are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel." *In re Citation of Unpublished Opinions/Orders and Judgments*, 151 F.R.D. 470 (10th Cir. 1993).

[9] Parties in cases where judgments were entered more than 180 days before December 1, 1991, could not obtain relief under Rule 4(a)(6) even if it were applied retroactively, since the period for seeking relief from judgment under that Rule would have run by the time the Rule took effect. Conversely, Rule 4(a)(6) clearly applies to cases in which the district court entered judgment on or after December 1, 1991, since the Rule "take[s] effect" on that date and "govern[s] all proceedings in appellate cases thereafter com-

2. a. Rule 60(b)(1) of the Federal Rules of Civil Procedure provides a party with an alternative avenue of relief from a final judgment when a party has acted with "excusable neglect." This Rule overlaps to some extent with Fed. R. App. P. 4(a)(5), which permits district courts to extend the time for filing a notice of appeal, based on a showing of "excusable neglect," if a motion is filed not later than 30 days after the deadline imposed by Rule 4(a)(1). Because of this overlap, the court of appeals limited the application of Rule 60(b)(1) to cases where the party's "excusable neglect" arose outside the period for filing an appeal or requesting an extension of time to do so. Pet. App. 9a. Petitioner (through his local counsel) received notice of the judgment five days after it was entered. His neglect "consequently arose prior to the expiration of the period specified in Rule 4(a) both for appeal and for extension of time to appeal," and petitioner was "therefore precluded from relief under Rule 60(b)(1)." Pet. App. 9a-10a. Petitioner claims that the Ninth Circuit's holding is inconsistent with decisions by several other circuits, which have not explicitly adopted the same time limitation on the applicability of Rule 60(b). Pet. 20-23. In fact, no conflict exists: none of the decisions cited by petitioner applied Rule 60(b) in a case where the excusable neglect arose during the period covered by Fed. R. App. P. 4(a).[10] Petitioner acknow-

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menced." Amendments to Federal Rules of Appellate Procedure, 500 U.S. at 1009.

[10] See *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institute*, 500 F.2d 808, 809-810 (D.C. Cir. 1974) (per curiam) (Rule 60(b) applied where excusable neglect arose upon notice to counsel ten months after entry of judgment); *Scola* v. *Boat Frances, R., Inc.*, 618 F.2d 147, 152 (1st Cir. 1980) (original notice of appeal held to be timely); *Mennen Co.* v. *Gillette Co.*, 719 F.2d at 569-570 (appellant granted relief under Fed. R. App. P.

ledges, moreover, that these decisions have applied a "due diligence" standard in ruling on motions under Fed. R. Civ. P. 60(b) to extend the time for appeal. See Pet. 20, 23. In light of the Ninth Circuit's statement that petitioner's lead counsel had failed to exercise due diligence, see Pet. App. 10a n.3, it appears that Rule 60(b) relief would have been denied even under the standard employed in those decisions.

b. The court of appeals also indicated that it was "most unlikely that the neglect of [petitioner's] attorneys could be found 'excusable,'" due to "the fact of actual notice, and the lack of due diligence by lead counsel who failed to inquire for six months." Pet. App. 10a n.3. The court observed that "[e]ven under the somewhat relaxed standard of 'excusable neglect' applied

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4(a)(5) after learning of judgment 43 days after it was entered); *Burkett* v. *Cunningham*, 826 F.2d 1208, 1215-1217 (3d Cir. 1987) (Rule 60(b) applied in case where habeas petitioner in state jail first received notice of final judgment more than two months after it was entered); *Hall* v. *Community Mental Health Center*, 772 F.2d 42 (3d Cir. 1985) (Rule 60(b) relief denied in case where appellant first learned of judgment five months after its entry); *Fidelity Deposit Co.* v. *USAFORM Hail Pool, Inc.*, 523 F.2d 744 (5th Cir. 1975) (Rule 60(b) applied in case where judgment entered 103 days prior to appellant's receiving notice), cert. denied, 425 U.S. 950 (1976); *Smith* v. *Jackson Tool & Die, Inc.*, 426 F.2d 5, 8 (5th Cir. 1970) (per curiam) (Rule 60(b) applied in case where appellant in private action learned of judgment 63 days after its entry); *Spika* v. *Village of Lombard*, 763 F.2d 282, 285 (7th Cir. 1985) (Rule 60(b) relief denied where appellant learned of judgment five months after it was entered), cert. denied, 474 U.S. 1056 (1986); *Buckeye Cellulose Corp.* v. *Braggs Electric Construction Co.*, 569 F.2d 1036, 1038 (8th Cir. 1978) (per curiam) (Rule 60(b) relief denied where appellant learned of judgment more than one year after its entry); *Harnish* v. *Manatee County*, 783 F.2d 1535, 1537-1538 (11th Cir. 1986) (Rule 60(b) applied in case where parties notified more than three months after entry of judgment).

by the Supreme Court in a bankruptcy context, a finding of excusable neglect was affirmed primarily because of a deficiency in the notice given to counsel." *Ibid.* (citing *Pioneer Investment Services Co.* v. *Brunswick Assocs., Ltd. Partnership*, 113 S. Ct. 1489, 1498 (1993)). Petitioner contends (Pet. 24-25) that the court of appeals' reference to "due diligence" reflects a misunderstanding of this Court's decision in *Pioneer*, which discussed the "excusable neglect" standard of Rule 60(b)(1) in the course of its analysis of Bankruptcy Rule 9006(b)(1). See 113 S. Ct. at 1497.[11]

This aspect of the court of appeals' analysis was unnecessary to the court's disposition of the case. In any event, the Ninth Circuit's reference to "due diligence" is wholly consistent with this Court's holding in *Pioneer* that "excusable neglect" includes "negligence." See 113 S. Ct. at 1497. By examining whether petitioner had been diligent in learning of the judgment, the Ninth Circuit was not requiring blameless conduct by petitioner or his attorneys. Rather, the court simply pointed out that the degree of counsel's negligence was "unlikely" to be deemed excusable, given that local counsel received actual notice of the final judgment and that lead counsel failed to make any inquiry about the case for almost six months. Pet. App. 10a. This Court's holding in *Pioneer*, a case which involved faulty notice and a mere 20-day delay, see 113 S. Ct. at 1493, 1499-1500, does not suggest a contrary result.

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[11] Petitioner acknowledges, however, that prior decisions permitting Rule 60(b) motions to extend the time for filing a notice of appeal have imposed a due diligence requirement. See Pet. 20, 22 n.9, 23.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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